

*RECENT DEVELOPMENTS IN SEARCH AND SEIZURE LAW*

*By Hon. Barry Kamins*

*Kings County Criminal Bar Association  
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# I. GENERAL FOURTH AMENDMENT PRINCIPLES

## A. Probable Cause

- 1) An exchange of an “unidentified object” for something that “appears to be currency” will constitute probable cause to believe drugs are being sold under a “totality of circumstances” test.

*People v. Smith*, 60 A.D.3d 456, 874 N.Y.S.2d 117 (1st Dept. 2009).

*People v. Williams*, 2010 NY Slip Op 00189 (2d Dept. 2010).

- 2) Mere possession of a crack pipe provides a police officer with probable cause to believe the pipe contains traces of a controlled substance.

*People v. Ketteles*, 62 A.D.3d 902 (2d Dept. 2009).

- 3) An innocuous response (“Come on, man”) to an officer’s inquiry cannot elevate reasonable suspicion to probable cause for an arrest.

*People v. Medley*, 23 Misc. 3d 25, 878 N.Y.S.2d 570 (App. Term, 2d, 11<sup>th</sup> and 13<sup>th</sup> Dist.) 2009

## B. Exclusionary Rule

- 1) The exclusionary rule will *not* be applied where an officer reasonably believes there is an outstanding arrest warrant but that belief is wrong because of a negligent bookkeeping error made by another police

employee and the benefits of deterrence do not outweigh the cost of excluding the evidence.

*Herring v. U.S.*, \_\_\_ U.S. \_\_\_ 129 S. Ct. 695(2009). *Cf. People v. Jennings*, 54 N.Y.2d 518 (1987).

2) DMV records are not suppressible as fruit of an unlawful stop of a vehicle.

*People v. Tolentino*, 59 A.D.3d 298, 873 N.Y.S.2d 602 (1st Dept. 2009), *leave granted*, 5/20/09.

#### C. Attenuation

Where consent to enter a dwelling occurs almost contemporaneously with a police officer's unlawful entry into a home, the prosecutor has a heavy burden to establish that the consent was voluntary and acquired by means sufficiently attenuated from the entry to dissipate the taint.

*In re Leroy M.*, 65 A.D.3d 500 (1<sup>st</sup> Dept. 2009).

#### D. Standing

*An individual does not retain a right to privacy in the genetic material which he or she leaves in public places and on objects.*

*People v. Sterling*, 57 A.D.3d 1110, 869 NY.S.2d 288 (3d Dept. 2008).

## II. STREET ENCOUNTERS ON LESS THAN PROBABLE CAUSE

### A. Reasonable Suspicion

- 1) A temporary investigative detention will be unlawful if it is not justified by special law enforcement interests.

*People v. Ryan*, 12 N.Y. 3d 28 (2009).

- 2) An anonymous 911 call reporting an ongoing emergency is entitled to a *higher* degree of reliability and requires a *lesser* showing of corroboration than a tip that merely alleges general criminality.

*United States v. Simmons*, 560 F.3d 98, (2d Cir. 2009).

- 3) Reasonable suspicion to believe a suspect is carrying a gravity knife can be based upon an officer's extensive experience with this type of weapon even if the knife's identify cannot be determined without testing it.

*People v. Fernandez*, 60 A.D.3d 549, (1<sup>st</sup> Dept. 2009). Cf. *People v. Mendez*, \_\_ A.D.3d \_\_ NYLJ 12/31/09 (1<sup>st</sup> Dept. 2009).

- 4) Body language is a factor that can be considered by a court in determining whether reasonable suspicion exists.

*People v. Joyce*, 58 A.D.3d 476 (1<sup>st</sup> Dept. 2009)

- 5) Reasonable suspicion can be based upon an unidentified individual directing a police officer's attention to a suspect in an accusatory

manner, if there are other incriminating factors present. *People v. Rosa*, 67 A.D.3d 440 (2009). Cf. *People v. Reyes*, 2010 NY Slip Op 00568 (1<sup>st</sup> Dept. 2010).

B. Common Law Inquiry

*Slight physical contact may be used during a level two encounter, e.g. physically guiding the suspect away from a crowd by grasping an elbow.*

*People v. Francois*, 61 A.D.3d 524 (1<sup>st</sup> Dept. 2009), leave granted.

C. The *DeBour* analysis of police activity can only be applied to street encounters and may not be applied to criminal investigations in a *residence*.

*People v. Madden*, 58 A.D.3d 1023, 871 N.Y.S.2d 766 (3d Dept. 2009).

### III. SEARCH WARRANTS AND EXCEPTIONS TO THE WARRANT REQUIREMENT

#### A. Searches

The placement of an electronic tracking device on a vehicle constitutes a search, requiring a search warrant based upon probable cause.

*People v. Weaver*, 12 N.Y.3d 433 (2009). *Cf. People v. Mabeus*, 63 A.D.3d 1447 (3d Dept. 2009)

#### B. Search Warrants

A warrant authorizing the seizure of “documents” that prove the sale of drugs, will not permit the seizure of recorded buy money or United States currency; the warrant must specifically permit the seizure of those items.

*People v. Marshall*, 57 A.D.3d 1163, 869 N.Y.S.2d 652 (3d Dept. 2009).

#### C. Exceptions to the Warrant Requirement

##### 1) Bodily examinations for drugs.

a. A visual body cavity search is unlawful when there is no reasonable suspicion to believe a suspect has secreted contraband.

*People v. Gonzalez*, 57 A.D.3d 1220 (3d Dept. 2008).

b. The police may not remove a bag, containing a white substance, that is protruding from the defendant’s buttocks, without a search warrant.

*People v. Maye*, 12 N.Y.3d 731 (2009).

c. A clothing exchange process, for newly admitted inmates in a jail, in which inmates disrobe and are given prison garb, does not constitute a strip search.

*Kelsey v. County of Schoharie*, 567 F.3d 54 (2d Cir. 2009).

2) Consent Searches

a. Failure of a resident to demand that the police leave the premises does not, in and of itself, establish prior consent to enter the premises.

*People v. Christianson*, 57 A.D.3d 1385 (4<sup>th</sup> Dept. 2008)

b. Defendant's consent to give a saliva sample for DNA testing is measured by the factors enumerated in *People v. Gonzalez*, 39 NY2d 122. *People v. Dail*, \_\_ A.D.2d \_\_, NYLJ 1/26/10.

3) Emergency Search

Examination of safety concerns after a fire is extinguished, e.g. boarded-up windows, does not constitute an immediate threat and, therefore, does not fall within the purview of the emergency exception.

*People v. Christianson*, 57 A.D.3d 1385 (4<sup>th</sup> Dept. 2008)

4) School Searches

Before a school official can conduct a strip search of a student, there must be reasonable suspicion that the student is concealing drugs or contraband in the student's underwear or that there is a danger to the other students.

*Safford v. Redding*, \_\_\_ U.S. \_\_\_ 129 S. Ct. 2633 (2009)

#### IV. AUTOMOBILES

##### A. Automobile Stops

###### 1. Legal Standard for VTL Stop of an Automobile

a. While various appellate courts continue to use both reasonable suspicion and probable cause standards for VTL stops, the Second Circuit had held that there is nothing in *Whren v. U.S.*, 517 U.S. 806 (1996) that casts doubt on the principle that *either* probable cause *or* reasonable suspicion can support a traffic stop.

*United States v. Stewart*, 551 F.3d 187, (2d Cir. 2009).

b. The Fourth Department has found that the Ingle, reasonable suspicion standard, is no longer the proper standard to be used and that an officer must have probable cause to believe the motorist committed a traffic infraction. *People v. Rose*, \_\_ A.D.3d \_\_, 889 N.Y.S.2d 789 (4<sup>th</sup> Dept. 2009).

2. A slight and momentary deviation onto a fog line does not justify a traffic stop.

*People v. Davis*, 58 A.D.3d 896 (3d Dept. 2009).

3. During a lawful traffic stop, the police may use a trained dog to engage in a “canine sniff” of the car’s exterior as long as:

a. the use of the dog does not unnecessarily prolong the encounter;  
and

b. the police have a right to conduct a common-law inquiry based on a founded suspicion that criminal activity is afoot.

*People v. Devone*, 57 A.D. 1240 (3d Dept. 2008) (*leave granted* 5/26/09).

4. During a lawful traffic stop, the police may not unnecessarily prolong the encounter to “investigate” based upon the defendant’s nervous appearance and the officer’s “gut” feeling.

*People v. Edwards*, 65 A.D.3d 829 (4<sup>th</sup> Dept. 2009)

5. During a traffic stop, a police officer may frisk an occupant of a motor vehicle if the officer reasonably believes the motorist is armed and dangerous. However, the officer need not have, in addition, a belief that the occupant is involved in criminal activity.

*Arizona v. Johnson*, \_\_\_ U.S. \_\_\_, 129 S. Ct. 781 (2009).

6. While a vehicle stop may be made based upon reasonable suspicion of criminal activity, no reasonable suspicion exists where, after midnight, a motorist leaves the parking lot of a group home closed for renovations.

*People v. Stock*, 57 A.D. 3d1424, 871 N.Y.S.2d 545 (4<sup>th</sup> Dept. 2008)

B. Search of Car to Retrieve Paperwork

Under certain circumstances, based on the safety concerns of the police, a police officer may enter a vehicle during a traffic stop to retrieve paperwork for the car.

*People v. Diaz*, \_\_ A.D.3d \_\_, NYLJ 12/31/09 (1<sup>st</sup> Dept. 2009);

*People v. Pryor*, \_\_ Misc.3d \_\_, 12/31/09 (N.Y. Crim. Ct. 2009).

C. Inventory Searches

An inventory search of an automobile will be invalid if the People fail to:

- 1) offer evidence that the police conduct is justified pursuant to the protocol set forth in the inventory guidelines of the local jurisdiction; or
- 2) prepare a meaningful inventory of the vehicle's contents that fully records the search results in a usable format.

*People v Gomez*, 13 N.Y.3d 6 (2009).

D. Search Incident to Arrest

A search of a car incident to an arrest can only be conducted if:

1. the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search or
2. there is "reason to believe" that evidence, relevant to the crime of arrest, might be found in the passenger compartment.

*Arizona v. Gant*, \_\_\_ U.S. \_\_\_, 129 S. Ct. 1710. (2009)

## V. SUPPRESSION HEARINGS

### 1. Factual Sufficiency of Motion Papers

a. If the defendant fails to controvert or deny the specific information provided by the People, a court may summarily deny the hearing. *People v. Mattocks*, 12 N.Y.3d 326 (2009).

b. If a defendant is provided information (*e.g.* voluntary disclosure and the accusatory instrument) that the police arrested him based on the victim's identification of him as the perpetrator, the defendant must do more than deny he committed the crime. He must (if he can) dispute that the victim made a report to the police or that the victim had a reliable basis for his or her conclusion.

*People v. France*, 12 N.Y.3d 790; see also, *People v. Sanchez*, 16 Misc.3d 1110(A) (2007).

c. Where the defendant raises a factual scenario alleging that a search occurred and the prosecutor raises a different scenario alleging that evidence was recovered in plain view, a suppression hearing is required to resolve the factual dispute.

*In Matter of Elvin G.*, 12 N.Y.3d 834 (2009).

2. A suppression hearing can be conducted in the absence of the defendant and his counsel if the court complies with the strict procedures outlined in *People v. Castillo*, 80 N.Y.2d 578 (1992). In the past, appellate courts have ruled on these procedures only in search warrant cases.

For the first time, however, the Court of Appeals has approved of these procedures in the context of a warrantless arrest of a defendant.

*People v. Lowe*, 17 N.Y.3d 768 (2009).

3. When a defendant waives his right to appeal, the Court must elicit that the defendant understands that the right to appeal a suppression ruling is different from the rights forfeited by the guilty plea, *i.e.* the right to go to trial.

*People v. Williams*, 59 A.D.3d 339, 874 N.Y.S.2d 63 (1st Dept. 2009).